

Issue: Group III Written Notice (failure to follow policy, abuse of State time, falsifying records, and unprofessional behavior); Hearing Date: 03/07/18; Decision Issued: 03/09/18; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11139; Outcome: No Relief – Agency Upheld.



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resource Management***

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11139**

Hearing Date: March 7, 2017  
Decision Issued: March 9, 2018

**PROCEDURAL HISTORY**

On September 25, 2017, Grievant was issued a Group III Written Notice of disciplinary action for failure to follow policy, abuse of State time, falsifying records and unprofessional behavior.

On October 25, 2017, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 27, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 7, 2018, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as an Asset and Inventory Manager. No evidence of prior active disciplinary action as introduced during the hearing.

Grievant worked ten hour days. Her shift began at approximately 7:30 a.m. and ended at approximately 6 p.m. She telecommuted from her home on Mondays. On Tuesdays, Wednesdays, and Thursdays she was scheduled to work at the Agency's office.

Grievant reported the time she worked as well as sick leave taken using the Agency's Computer System C. For example, if Grievant worked ten hours on a date, she would update Computer System C to show that she worked ten hours that date.

If Grievant was working, it would be unusual for her not to have responded to an email using her VDOT email account. She could access her VDOT email account using her VDOT computer, VDOT cell phone, or other computing device.

After receiving anonymous allegations that Grievant was not reporting to work as scheduled, the Agency placed software on Grievant's laptop computer without her knowledge. The software took screen shots of Grievant's computer every 30 seconds. The screen shots were taken even if the computer was not logged into the Agency's computer systems.

On January 24, 2017, Grievant reported in Computer System C that she worked ten hours. She did not access her VDOT computer. She did not use her VDOT cell phone to make calls. She did not use her VDOT email account to send emails. The Unit's calendar showed Grievant was out of the office. The Agency concluded Grievant did not work on VDOT business for ten hours on January 24, 2017.

On March 27, 2017, Grievant reported in Computer System C that she worked ten hours. She teleworked that day. She worked on her VDOT computer for approximately 1.5 hours. She received telephone calls on her VDOT cell phone at 10:26 a.m. and 1:58 p.m. The Agency concluded Grievant did not work on VDOT business for approximately eight hours on March 27, 2017.

On March 30, 2017, Grievant reported in Computer System C that she worked ten hours. She did not access her VDOT computer. At 1:15 p.m., Grievant answered a telephone call using her VDOT cell phone. She was near or in her home when she answered the call. The Agency concluded Grievant did not work on VDOT business for ten hours on March 30, 2017.

On April 19, 2017, Grievant reported in Computer System C that she worked ten hours. She did not access her VDOT computer. She did not use her VDOT cell phone. She accessed several emails using her VDOT account around noon. The Agency concluded Grievant did not work on VDOT business for ten hours on April 19, 2017.

On April 25, 2017, Grievant reported in Computer System C that she worked ten hours. She logged on to her VDOT computer at 7:35 a.m. and logged off at 8:22 a.m. Grievant did not use her VDOT cell phone. She did not send any emails using her VDOT account. The Agency concluded Grievant did not work on VDOT business for ten hours on April 25, 2017.

On June 1, 2017, Grievant reported in Computer System C that she worked five hours and took five hours of sick leave. She did not have any computer activity on her VDOT computer. Grievant called her voicemail at 5:15 a.m. and received a call at 9:54 a.m. using her VDOT cell phone. Grievant did not send any emails from her VDOT account. The Agency concluded Grievant did not work on VDOT business for five hours on June 1, 2017.

On July 25, 2017, Grievant reported in Computer System C that she worked ten hours. She did not access her computer that day. She did not use her VDOT cell

phone. She did not send any emails from her VDOT account. The Agency concluded Grievant did not work on VDOT business on July 25, 2017.

On August 9, 2017, Grievant reported in Computer System C that she worked ten hours. She did not access her computer that day. She did not use her VDOT cell phone. On her personal calendar, Grievant wrote that she was out of the office. The Agency concluded Grievant did not work on VDOT business on August 9, 2017.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>1</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

"[F]alsification of records" is a Group III offense.<sup>2</sup> Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6<sup>th</sup> Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. \*\*\*

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

The Agency has presented sufficient evidence to support its conclusion that Grievant falsified records. She claimed to have been at work on numerous days that she was not working. She engaged in this behavior a sufficient number of times to establish a pattern of behavior. That pattern shows Grievant knew or should have known that she was falsely reporting that she was working when she was not actually working. The Agency’s issuance of a Group III Written Notice must be upheld.

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

Grievant argued that she was at work but unable to remember what activities she performed on specific days several weeks and months in hindsight. She argued that she spent many hours at her desk reviewing documents and would not be accessing her VDOT cell phone or computer. She argued she spent many hours working outside of her office. Although it is clear Grievant devoted much of her time to matters that would not be recorded on a VDOT computer or cell phone, it is also clear that Grievant could not have spent entire days without accessing her Agency computer or cell phone if she were at her office working. It would be highly unusual for Grievant to have so many days where she had no computer or cellphone activity. The only logical explanation is that she was not working as she claimed.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management ....”<sup>3</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor

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<sup>3</sup> Va. Code § 2.2-3005.

Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.